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No. 88-2035

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ADAMS FRUIT COMPANY, INC.,

Petitioner,

v.

RAMSFORD BARRETT, DAVID SAPP, EDWARD TYRELL, DARYL HAMILTON, GARFIELD HILLS, JR., ANTHONY GILL, LYNVAL ALDRIDGE, SEMORE HAYLES, AUDLEY KIRLEW and WINSTON WARNER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION AND BRIEF OF AMICUS CURIAE THE NATIONAL COUNCIL OF SELF-INSURERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY THE NATIONAL COUNCIL OF SELF-INSURERS IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3 of the rules of this Court, the National Council of Self-Insurers respectfully moves for leave to file the attached brief *amicus curiae* in support of the petitioner. Petitioner has consented to the filing of this brief. This motion is required by the absence of consent by the respondents.

The National Council of Self-Insurers speaks for major employers, frequently multi-state employers, of the United States who assume the direct responsibility for paying workers' compensation benefits for their employees, sometimes referred to as "self-insuring," under applicable state and federal workers' compensation laws. Approximately thirty percent of the employees in the United States work for self-insured employers. It is also the parent organization for twenty-five state self-insurance organizations, active in each state on workers' compensation issues. The National Council supports the workers' compensation laws as an essential part of the social and economic framework of our society.

Its interest in this case is in preserving that framework. The Decision and Opinion of the Eleventh Court of Appeals ignores the historic compromise of workers' compensation legislation described by this Court in *New York Central R. Co. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917); it destroys its cornerstone, the exclusive remedy.

Workers' compensation statutes were a drastic change in the prevailing common law; they were justified constitutionally and philosophically by this Court in the *New York Central* case. For the employee, he gave up his right to a jury trial, but he no longer had to prove negligence to recover the economic replacement of his loss. The employer gave up his defenses of contributory negligence, assumption of risk, and the fellow servant rule, and agreed to pay the economic consequences of the injury irrespective of fault or negligence.

This new system substituted for the "hit or miss" character of court litigation; under workers' compensation every injured employee recovers his economic loss.

In respect to the specific issue before the Court on this petition, that the workers' compensation statute is the sole and exclusive remedy for employment injuries, this Court upheld the constitutionality of workers' compensation originally on the basis that, while the employer paid without regard to fault or negligence, he was relieved "from responsibility for damages measured by common law standards . . . ." *Ibid.*, 243 U.S. 188, 189. This was the "balancing of interests" or the "trade off" which made workers' compensation viable and constitutional.

The Decision below also shows considerable ignorance about the benefit levels of workers' compensation with the statement, "We note that workers' compensation benefits do not compensate workers for their full damages. *See, e.g.*, Fla. Stat. Sec. 440, 15-16 (Compensation capped at 66⅔rds of average wages)." The Opinion seems unaware that workers' compensation benefits are tax-free, and that 66⅔rds of gross taxable earnings on a tax-free basis is very close to the "take home" pay, the actual earnings of employees. Whether this satisfies that court's concept of "full damages" can't be determined, for the Opinion does not define it. But, it is worth noting that the employees get their workers' compensation benefits immediately, without the expense and delay of litigation in court.

Last, the Opinion below fails to appreciate the basic purpose of both federal (the Longshore and Harbor Workers' Act and the Federal Employees Compensation Act) and the state workers' compensation laws, which is to take care of the injured employee and his family immediately, without wasting time investigating liability or defenses to liability. All these statutes, both federal and state, mandate this attention by expressly relieving the employer of having to defend in the courts to pay jury verdicts for

the personal injury involved. This is the sound economic and social policy embodied in workers' compensation statutes. If changed, an employer must be very cautious about making even the first payment to the employee until after a lengthy investigation. The Opinion below casts no light on what will happen to a destitute farm worker in the interim.

The Opinion below will require an employer to pay twice, and permit the employee to recover twice, for the same personal injury. Dual litigation and double recoveries should not be encouraged.

The National Council of Self-Insurers believes these views should be before the Court as it considers the Petition for Certiorari, and moves it be permitted to intervene as *amicus curiae* and file the attached brief instanter.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE THE NATIONAL COUNCIL OF SELF-INSURERS IN SUPPORT OF PETITIONER

The National Council of Self-Insurers respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari.

INTEREST OF THE AMICUS CURIAE

The National Council of Self-Insurers is a voluntary association of employers, many of them multi-state employers, who self-insure their workers' compensation responsibilities, that is, pay these benefits directly to injured employees. It is also a parent organization for 25 state self-insurance associations involved in the workers' compensation problems of each such state.

The National Council is devoted to the proper operation of the workers' compensation systems which exist in every state, as well as in those areas in which federal workers' compensation laws prevail such as the Longshore and Harbor Workers' Act and the Federal Employees Compensation Act. It supports these workers' compensation systems, and desires to assist them in maintaining and retaining their economic and social goals.

STATEMENT

This case presents a severe threat to the social and economic fabric of the workers' compensation laws in both state and federal areas of jurisdiction. Virtually all employers and employees in the United States operate in reliance on these laws and their salutary procedures, benefits and protections. The decision below destroys the foundation of these state and federal workers' compensation laws by authorizing an added personal injury action at common law, to an employee who has already been compensated in accordance with the workers' compensation law.

The National Council of Self-Insurers believes that the principles of workers' compensation are a vital part of the social and economic framework for employment in the United States. The public policy behind such laws is that when an injury occurs, employers should address immediately the medical and economic needs of the injured worker and his family, rather than delay such benefits while investigating liability, or defenses to liability. In return for this immediate attention to the needs of the injured employee, the employer is immune from liabilities based upon fault or negligence and from liabilities assessed by juries, and does not even need to investigate an accident from the point of view of fault or liability.

The new and separate personal injury cause of action authorized by the decision below results from the court's interpretation of an Act of Congress known as the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854. In the appraisal of *amicus*, it is the first time that a regulatory act of Congress has been held to supersede the exclusive remedy of an applicable workers' compensation statute, state or federal.

There is some variance among the states concerning coverage of agricultural workers by workers' compensation statutes, a variation in coverages which may have affected congressional considerations. But there is no such question in this case; the plaintiffs here are covered and have already received the workers' compensation benefits in accordance with Florida law.

The decision below authorizes an additional cause of action, in fact a double recovery, for the same personal injury already compensated under the workers' compensation laws of Florida. It thus destroys the essential cornerstone of workers' compensation, that an employer pay workers' compensation benefits irrespective of fault or

negligence, without the need to investigate liability issues, and in return is relieved of the responsibility of defending in court or paying damages assessed by a jury under common law principles.

Amicus believes that this important public policy is not merely threatened, but devastated by the decision below.

REASONS FOR GRANTING THE PETITION

I.

THE EXCLUSIVE REMEDY OF WORKERS' COMPENSATION, WITH THE CONCOMITANT RESPONSIBILITY OF THE EMPLOYER TO TAKE IMMEDIATE STEPS TO ASSIST THE WORKER AND HIS FAMILY, WAS THE CORNERSTONE SUPPORTING THE CONSTITUTIONALITY OF WORKERS' COMPENSATION LEGISLATION, AND SHOULD NOT BE ABANDONED.

Workers' compensation statutes represent an historic compromise with our common law tradition. Prior to the enactment of such laws, an employee could recover for an injury only if he proved negligence against his employer. The employer could defend on the ground that he was not negligent, that the employee was contributorily negligent, that the employee had "assumed the risk," or that any negligence was on the part of a fellow servant, not the employer.

Injuries did occur in the course of production of goods and services, and workers and their families dependent upon regular paychecks for existence often received nothing. If they did recover, the litigation delay meant long periods during which the worker and his family received nothing, and often became public charges.

Workers' compensation statutes were designed to bring immediate medical attention and immediate economic sustenance to the worker and his family. The employee would receive these benefits whether or not there was negligence involved in the accident, and the employer would pay without regard to negligence or any other defenses. The "balance of interest" or the "trade-off" was that the employer, being required to pay without regard to fault, and paying currently rather than at the conclusion of lengthy litigation, was immune from common law actions and jury verdicts.

Thus, our society substituted the certainty of payments for economic loss for the uncertain, "hit and miss" character of common law litigation.

Workers' compensation laws were a drastic change from the common law, and raised serious constitutional issues. In 1917, this Court had before it three challenges to the constitutionality of state enacted workers' compensation laws, from New York, from Iowa, and from Washington. *New York Central R. Co. v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667; *Hawkins v. Bleakley*, 243 U.S. 210, 37 S.Ct. 255, 61 L.Ed. 678; and *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685. In each case, this Court upheld the constitutionality of the workers' compensation laws as an exercise of the police power. But, the cornerstone of the constitutional "balancing of interests" was the fact that the employer was relieved "from responsibility for damages measured by common law standards . . ." *New York Central R. Co. v. White*, 343 U.S. 188 at 198.[1]

[1] All states followed this Decision. Citing it, the Illinois Supreme Court stated:

(Footnote continued on following page)

Every state now has a workers' compensation law. The federal government has enacted a workers' compensation law for areas under federal jurisdiction, the Longshore and Harbor Workers' Act, and for federal employees, the Federal Employment Compensation Act. Each statute contains the clear expression that workers' compensation is the exclusive remedy for an employee's injury, and the employer is immune from all other law suits and damages assessed by juries for that same personal injury.

Professor Larson traces this development, and in his treatise states:

> "Once a workers' compensation act has become applicable . . . , it affords the exclusive remedy for the injury by the employee or his dependents against the employer and the insurance company. This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts." Section 65-10, Vol. 2A, *Larson's Workmen's Compensation Law.*

The decision by the Eleventh Circuit Court of Appeals below does not recognize or discuss the violence which it does to the long-standing economic and social fabric of workers' compensation in the United States. The Opinion below is a cavalier abandonment of the philosophical and

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[1] *continued*

> "The scheme of the act is so wide a departure from common law standards respecting responsibility of employer to employee that doubts naturally arise respecting its constitutional validity . . . [but on the balance of the interests] the legislation relieves the employer from responsibility for damages measured by common law standards . . . payable in cases where he is at fault." *Grand Trunk Western Ry. v. Industrial Commission*, 291 Ill. 167, 175, 125 N.E. 748 (1920).

constitutional parameters of workers' compensation expressed by the holdings of this Court in 1917 in the cases cited above, principles which remain current and viable today in the everyday life of employment in the United States.

II.

OUR COURTS, INCLUDING THIS COURT, HAVE CONSISTENTLY REFUSED TO CONSTRUE VARIOUS REGULATORY ACTS OF CONGRESS AS ABOLISHING THE EXCLUSIVE REMEDY OF WORKERS' COMPENSATION LAWS.

Attempts to evade the exclusive remedy of workers' compensation laws are numerous. But, our courts, including this Court, have consistently refused to permit its erosion.

An attempt to evade the workers' compensation law by suing under the federal Tort Claims Act was rejected in *United States v. Demko*, 385 U.S. 149, 87 S.Ct. 382, 17 L.Ed.2d 258 (1966). In accord, *Schmid v. United States*, 645 F.Supp. 486 (E.D. Pa. 1986).

An attempt to use the RICO statute to evade workers' compensation exclusive jurisdiction was rejected in *Tellis v. U.S. Fidelity & Guaranty Co.*, 625 F.Supp. 92 (N.D. Ill. 1985), *affirmed*, 805 F.2d 741 (7th Cir. 1986).

An attempt to use federal admiralty law and the regulatory features of the Public Vessels Act to evade the exclusive remedy of workers' compensation was rejected. *Johansen v. United States*, 343 U.S. 427, 72 S.Ct. 849, 96 L.Ed. 1051, *reh'g denied*, 344 U.S. 848, 73 S.Ct. 5, 97 L.Ed. 660 (1952); *Sample v. Johnson*, 771 F.2d 1335 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 1206, 89 L.Ed. 319 (1986).

Even when couched as an *in rem* action against the ship, rather than an *in persona* action against the employer, our courts have rejected such attempts; the Long-

shore and Harbor Workers' Act was held to be the exclusive remedy. *Bynum v. S. S. Mormacteal*, 188 F.Supp. 763 (E.D. Pa. 1960). These federal workers' compensation statutes (Longshore and Harbor Workers' Act and the Federal Employees Compensation Act) are the same as the state statutes in declaring that workers' compensation is the exclusive remedy.

If the decision below is upheld, that this Act of Congress overrides Florida's exclusive remedy statute, it follows that the exclusive remedy of the federal laws, the Longshore and Harbor Workers' Act and the Federal Employees Compensation Act, becomes meaningless, too.

These regulatory acts of Congress were not construed to invade the exclusive remedy of workers' compensation laws. The statutes involved created causes of action far more definitively than does the AWPA, but did not invade the exclusive remedy. The construction by the Eleventh Circuit in this case is in error, inconsistent with the construction given by the courts in other cases of alleged conflict between acts of Congress and workers' compensation statutes.

III.

THE OPINION BELOW ADMITS IT ALLOWS A DOUBLE RECOVERY FOR THE SAME PERSONAL INJURY ON THE IMPLIED BUT ERRONEOUS BASIS THAT WORKERS' COMPENSATION BENEFITS ARE INADEQUATE.

Near the end of this opinion, the court below addresses the problem of double recovery as follows:

> "Appellee finally argues that it would be contrary to Congressional intent and unfair to allow double recovery under workers' compensation laws and a suit for actual or statutory damages under the act. We note that workers' compensation benefits do not compensate workers for their full actual damages, *see, e.g.*, Fla. Stat. Sec. 440.15-.16. (Compensation capped at 66⅔% of average wage.)"

This argument was specifically rejected by this Court in *United States v. Demko*, 385 U.S. 149, 87 S.Ct. 382, 17 L.Ed.2d 258 (1966). In addition, it is erroneous.

The opinion below fails to note that workers' compensation benefits are tax-free, and that tax-fee benefits of 66⅔% of gross wages are very close to actual "take home" pay. Thus, the payment of workers' compensation benefits on a tax-free basis, plus all medical expenses in full, may very well be the "full actual damages" desired by the court below. Since the opinion denigrates workers' compensation benefits only on this erroneous basis, and gives no other definition of "full actual damages," *amicus* submits that workers' compensation may already have paid the "full actual damages."

Perhaps workers' compensation has paid even more than "full actual damages" since the injured employee gets the money and his medical bills paid immediately, when he needs it, without the delay and expense of common law litigation. In terms of economic loss, workers' compensation often pays "full actual damages" more adequately than court litigation does—as well as paying in every case of employee injury, irrespective of liability.

CONCLUSION

The opinion below shows a lack of understanding of the benefits paid under workers' compensation laws, both state and federal, in addition to a lack of appreciation of

the economic, philosophic and constitutional bases of workers' compensation set forth in Part I above, and its importance in the employment life of the United States.

For these reasons, the National Council of Self-Insurers as *amicus curiae*, urges this Court to grant the Petition for Certiorari.

Respectfully submitted,

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